Filed 3/8/10 P. v. Armas CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

AMADO SALDIVAR ARMAS,

Defendant and Appellant.

F056887

(Super. Ct. No. SUF 30462)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Harry L. Jacobs, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.)

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Amado Saldivar Armas was charged in count 1 of a lewd or lascivious act (Pen. Code, § 288, subd. (a)), in count 2 of a lewd or lascivious act by force[1] (Pen. Code, § 288, subd. (b)(1)), and in count 3 of aggravated sexual assault (rape) (Pen. Code, § 269, subd. (a)(1)), with seven-year-old S.R. as the victim. He was convicted as charged for the lewd or lascivious act allegations, but the aggravated sexual assault count was dismissed after the jury could not reach a verdict.[2] He appeals, raising numerous errors. We will find instructional error that, under the circumstances of this case, taints the validity of the conviction in count 2; our directions on remand will follow.

FACTS

Defendant and Olivia had a relationship which produced one child, G. Olivia has a daughter, S.R., from a prior relationship. Olivia's sister Ana lived with Olivia and Olivia's children. Although defendant did not live with Olivia and her children, he frequently was at the home and also stayed with S.R. when Ana and Olivia were not home. In late December 2006, Olivia found out that defendant was married, and she broke off their relationship.

On January 7, 2007, Olivia was with Juan in front of her mother's house. Defendant saw Olivia with Juan, and there was an argument. Defendant told Olivia he was going to take his daughter, G., away from Olivia. S.R. witnessed the argument and became very upset. S.R. came inside her grandmother's house and told her that defendant had done things to her. She told her grandmother that defendant would tell her to kiss his penis and defendant would kiss her all over. Defendant had instructed S.R. to not tell anyone. He gave S.R. money.

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[1] We will use the shorthand description of a lewd or lascivious act by force when referring to a lewd or lascivious act by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

[2] Defendant's first trial ended in a mistrial after the jury was unable to reach a unanimous verdict on all counts.

S.R. also told her Aunt Alma what happened to her. When Olivia came inside, she was told about what defendant had done to S.R. Olivia called the police.

A videotaped interview of S.R. was conducted in January of 2007 at the "Multi-Discipline Interview Center" (MDIC). S.R. described the first time defendant touched her inappropriately. She said she was on the bed when defendant came in and kissed her on the mouth. S.R. told the interviewer that defendant would come in while S.R. was on the bed in her mother's bedroom, remove her clothing, and lick her on her "private spot." Defendant would lock the door to the room so G. could not come in. S.R. would tell defendant to let G. come in, but he would not let her in the room. S.R. tried to leave, but defendant would not let her leave and he would say to her, "don't you want me to kiss you on the mouth and ..." S.R. also said she would tell defendant to leave her alone. When S.R. did leave the room, defendant would yell at her to come back to the room. When S.R. was in her mother's bedroom and wanted to return to watching television in the other room, defendant would not let her leave; she had to stay in the mother's bedroom. On another occasion, defendant tried to put his "nasty part" in her private spot and he got it in. Defendant also kissed her and licked her breasts. S.R. recalled that one evening when her mother was at the hospital she woke up to find defendant licking her private parts. Defendant had removed her clothes.

When asked about other touchings, S.R. said defendant touched her "back butt" many times with his hand. S.R. was afraid to tell anyone about these incidents.

On February 7, 2007, S.R. made a pretextual telephone call to defendant. During the telephone call, she told him she wanted to see him. Defendant asked S.R. if she had received the money he had given to her mother and he told her that when he went to the store he was going to buy her something. S.R. told defendant that her mom did not know she was on the telephone, and she wanted to tell him something. S.R. then told defendant that she wanted to see him but he had to promise that he would not do to her what he had done to her before. He promised he would not. She told him it was not good for her

when he used to touch her and that those things were bad. Defendant replied that he knew that and there would be no more. She repeated to him several times that he could not touch any part of her anymore. He replied, "never, never." He finished the conversation by telling S.R. that when she needs something she should tell her mom to ask him for it.

Margie Jessen, a nurse practitioner, conducted a sexual assault examination of S.R. on March 13, 2007. While conducting the examination with S.R.. lying on her back, Jessen asked her to relax her legs. S.R. said, "That's what he does to me." Jessen did not include this statement in her report. The examination was consistent with the history given by S.R., although the examination was normal and it could not be determined from the examination whether defendant did or did not do the acts he was accused of doing. Jessen testified that it is possible to insert a penis into the genital area without penetrating the hymen because the hymen is elastic.

At trial in September 2008, S.R. testified about incidents that occurred when she stayed with defendant alone while her mother and aunt were away at work. On these occasions, defendant touched her "a lot of times." She said that defendant kissed her mouth to mouth, touched her breasts, private part, and "back butt" with his hands. He also licked her breasts and her front private part. She remembered one occasion when she was on her mother's bed watching television. Defendant grabbed her, took her clothes off and touched his "nasty part" to her private part. He "put it in there" and it felt "gross" and "nasty"; this type of sexual behavior occurred on only one occasion.

On the day S.R.'s mother went to the hospital, S.R. awoke from her sleep to find defendant licking her private part. On another occasion, defendant and S.R. were outside of the "ranch" in his pickup truck. He licked her private part while they were in the truck. S.R. testified that defendant touched her and licked her at other times, but she was unable to give any specific details. These touchings occurred sometimes in the afternoon after school and sometimes at night.

S.R. testified somewhat inconsistently on whether she resisted defendant. She was scared and did not try to get away, but she also testified that defendant would follow her, grab her, and start doing things to her. She was afraid that if she told her mother defendant would do bad things to her family. S.R. testified that she tried to leave all the time but defendant would grab her. She felt like she wanted to run, she tried, but she did not because she was afraid. S.R. also testified she did not remember any time when she tried to get away but defendant actually kept her from leaving.

When defendant molested S.R. on the bed, he would pull her to face away from the television. When S.R. would try to put her clothes back on, defendant would say to her, "a little bit more." Although defendant never verbalized threats to S.R., she was afraid he would do bad things, would hit her, or would do something to their belongings.

The tapes of the pretextual telephone call and the MDIC interview were played for the jury.

Dr. David Kerns, a pediatrician, testified that girls' genitals heal very rapidly following injury and the majority of girls who have been sexually abused have normal anatomy. If the examination takes place three months or more after clear injury, at the time of the examination the girl will usually appear to have normal anatomy. He testified that it is sometimes difficult for a child to determine if there was vaginal penetration or just superficial contact with the genital area.

S.R.'s mother and aunt testified that the mother went to the hospital in December 2006 and defendant was home with S.R. and G.

Defense

Dr. Gail Newel reviewed the photographs from S.R.'s sexual assault examination. She testified that the photographs were not consistent with penile penetration. Because S.R. had a small vaginal opening and a completely intact hymen, penetration of her vagina could be ruled out.

Dr. Bruce Terrell reviewed materials from the case, including the MDIC interview. He testified regarding factors that would support a claim of sexual abuse and factors that would not support a claim of sexual abuse. Dr. Terrell found that S.R. showed little emotion during the MDIC interview and did not hesitate to talk; these are indications that the claimed sexual abuse might not be true. It was Dr. Terrell's opinion that there is usually a motive for false allegations of sexual abuse. One such motive can be child custody issues.

The defense presented evidence of Olivia's, Ana's, and defendant's work schedules to show that defendant could not have been available to baby-sit S.R. on the number of occasions claimed.

DISCUSSION

I. Evidence of Force

Defendant was found guilty of one count of committing a lewd or lascivious act upon S.R. and one count of committing a lewd or lascivious act upon her by force. At trial, the prosecutor did not specify which act of molestation served as the basis for each charge. Instead, the prosecutor argued that all of the acts against S.R. were accomplished by force, yet he was only charged with one act by force.

Defendant contends that none of the acts of molestation were supported by evidence sufficient to support the finding of force. We disagree.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331, brackets in original.)

"Given this court's limited role on appeal, defendant bears an enormous burden in claiming there is insufficient evidence to sustain [the force element of] his molestation conviction[]. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves." (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.)

First, defendant argues there was no evidence that he accomplished any of the acts with physical force different from or greater than that necessary to accomplish the acts; thus there was no evidence of force. He contends that although S.R. said defendant would grab her, she also testified there was never a time when she tried to get away but he kept her from doing so. It is argued that force cannot be attributed to defendant's acts when he grabbed S.R., or pulled her to get her into position, or took her clothes off.

"'[I]t is incumbent upon the People to prove that the defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act iself.' [Citation.] In *Cicero* [*People v. Cicero* (1984) 157 Cal.App.3d 465], that requisite evidence of force was supplied by evidence that the defendant had picked up his victims and carried them along: these acts were 'applications of physical force substantially different from *and* substantially greater than that necessary to accomplish the lewd act of feeling their crotches.'" (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1201-1202.)

Although S.R. testified that she did not try to do anything to get away from defendant because she was afraid of him, she also testified that defendant would follow her, grab her, and start doing things. Following her and grabbing her before engaging in the sexual acts were applications of force greater than necessary to accomplish the lewd acts. Even if we were to find these acts standing alone were not sufficient to constitute force, when combined with other actions of the defendant there was sufficient evidence of duress to support the conviction of a lewd or lascivious act by force.

"For purposes of section 288, subdivision (b), 'duress' means '"a direct or implied *threat* of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed, or (2) acquiesce in an act to which one otherwise would not have submitted." [Citations.]' [Citation.] '"The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress." [Citation.]' [Citations.] 'Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family.' [Citations.]" (*People v. Veale, supra,* 160 Cal.App.4th at p. 46, brackets in original.)

We find the analysis in the case of *People v. Veale, supra,* 160 Cal.App.4th 40 to be dispositive on the question of whether the evidence showed that duress was used to accomplish the lewd or lascivious act. In *Veale,* the defendant moved in with the mother and shortly thereafter married the mother. The mother's six- or seven-year-old daughter, Brianna, was molested by the defendant beginning shortly after he moved in with the mother. The defendant touched Brianna's genital area with his penis and his hand on several occasions. Although the incidents did not hurt, Brianna did not like what the defendant was doing and "felt bad." (*Id.* at p. 43.)

On one occasion, the defendant asked Brianna to touch his penis. "She became angry, threw clothes around the room, and did not do it. Defendant did not ask her to do this again. Another time, defendant asked Brianna if he could put his penis in her mouth. Brianna got angry and defendant did not do it. Defendant did not ask her again to do this." (*People v. Veale, supra,* 160 Cal.App.4th at p. 43.)

In *Veale,* after the mother found the defendant on top of Brianna and questioned Brianna, she said nothing happened. Later Brianna told her mother about the sexual assaults. Brianna was interviewed. She said the defendant had molested her but had not

hurt her. She said she was afraid she would get in trouble by telling the social worker what happened and she feared the defendant was going to kill someone, although he never told her he would. The defendant was convicted of several counts of lewd or lascivious acts by force, fear or duress. On appeal he claimed there was no evidence he used force, fear or duress. The appellate court disagreed. (*People v. Veale, supra*, 160 Cal.App.4th at pp. 42-45.)

The defendant in *Veale* relied on the same cases relied on by defendant here; we set forth in full the *Veale* analysis of these cases since it is equally applicable here:

"Citing *People v. Hecker* (1990) 219 Cal.App.3d 1238 (*Hecker*) and *People v. Espinoza* (2002) 95 Cal.App.4th 1287 (*Espinoza*), defendant argues such evidence was insufficient since there was no evidence that defendant used physical force in molesting Brianna or threatened Brianna in any way. In *Hecker*, the court concluded there was insufficient evidence of duress and therefore reduced the defendant's section 288, subdivision (b) conviction to a section 288, subdivision (a) conviction. The *Hecker* court explained that the only difference between a section 288, subdivision (a) and a subdivision (b) offense is that the subdivision (b) offense requires a finding that the molestation was committed using force or duress. (*Hecker, supra*, at p. 1249.) In the context of section 288, the concept of force and duress is not necessary to prove a lack of consent; 'instead it simply serves to distinguish certain more culpable nonconsensual sex acts from others.' (*Hecker*, at p. 1249.)

"In *Hecker*, the defendant was convicted under section 288, subdivision (b) of having anal and vaginal intercourse with his 12-year-old stepdaughter. As in the instant case, the defendant lived with the victim and molested her when he was alone with her at their home, in the defendant's bedroom. Also, the victim testified the defendant did not use physical force. (*Hecker, supra*, 219 Cal.App.3d at pp. 1242, 1250.)

"Despite these similarities, *Hecker* is distinguishable because the *Hecker* victim was five years older than Brianna and testified she was not afraid of the defendant

harming her, even though she may have been 'subconsciously afraid.' (*Hecker*, *supra*, 219 Cal.App.3d at p. 1242.)

"Also, while the court in *Hecker* stated that 'psychological coercion' without more was insufficient to establish duress, the court in *Cochran* [*People v. Cochran* (2002) 103 Cal.App.4th 8] disagreed. In *Cochran*, … the court found the language in *Hecker* 'overly broad' and explained: 'The very nature of duress is psychological coercion. A threat to a child of adverse consequences, such as suggesting the child will be breaking up the family or marriage if she reports or fails to acquiesce in the molestation, may constitute a threat of retribution and may be sufficient to establish duress, particularly if the child is young and the defendant is her parent. We also note that such a threat also represents a defendant's attempt to isolate the victim and increase or maintain her vulnerability to his assaults.' (*Id.* at p. 15.)

"In *Cochran*, the court held that there was sufficient evidence of duress to support the defendant's conviction for violating section 288, subdivision (b), reasoning in part: 'The victim was only nine years old. Cochran is her father with whom she resided. She was four feet three inches tall. He was five feet nine inches tall and outweighed her by about 100 pounds. The sexual acts occurred in the family home she shared with Cochran and her mother. Throughout the videotape, Cochran directs and coaches the victim what to do. It is clear the daughter is reluctant to engage in the activities and, at most, acquiesces in the conduct.' (*Cochran*, *supra*, 103 Cal.App.4th at p. 15, fn. omitted.)

"The *Cochran* court further stated that, 'Additionally, there was the victim's trial testimony. Although she testified she was not afraid of Cochran, that he did not beat or punish her and never grabbed or forced her, she also testified she was mad or sad about what he was doing to her, that he gave her money or gifts when they were alone together, and that he told her not to tell anyone because he would get in trouble and could go to jail. [¶] This record paints a picture of a small, vulnerable and isolated child who engaged in sex acts only in response to her father's parental and physical authority. Her

compliance was derived from intimidation and the psychological control he exercised over her and was not the result of freely given consent. [Fn. omitted.] Under these circumstances, given the age and size of the victim, her relationship to the defendant, and the implicit threat that she would break up the family if she did not comply, the evidence amply supports a finding of duress.' (*Cochran, supra,* 103 Cal.App.4th at pp. 15-16.)

"The instant case is similar in many significant ways to *Cochran*, although we recognize *Cochran* differs in that defendant was Brianna's stepfather, rather than her biological father, and there was no testimony defendant told Brianna that if she reported the molestation, she would break up the family. Nevertheless, the evidence is sufficient to support a finding of duress, based on Brianna's age and size; her relationship to defendant; and her testimony that she feared defendant and feared he would harm or kill her or mother if she told anyone defendant was molesting her. Furthermore, Brianna was even younger than the victim in *Cochran*. It could be reasonably inferred that defendant threatened Brianna implicitly or explicitly, based on her fear of defendant and fear he would harm her or mother. This fear[,] along with the other mentioned factors, is sufficient to support a finding of duress within the meaning of section 288, subdivision (b).

"As the court in *Cochran* notes, 'as a factual matter, when the victim is as young as this victim and is molested by her father in the family home, in all but the rarest cases duress will be present.' (*Cochran, supra*, 103 Cal.App.4th at p. 16, fn. 6.) Although in the instant case, defendant was Brianna's stepfather, rather than her father, he held a similar position of authority in Brianna's home, which would support a finding of duress, along with Brianna's testimony she feared defendant.

"As noted in *People v. Schulz* [(1992) 2 Cal.App.4th 999, 1005], '[D]uress involves psychological coercion. [Citation.] Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] "Where the defendant is a family member and the

victim is young, ... the position of dominance and authority of the defendant and his continuous exploitation of the victim" [are] relevant to the existence of duress. [Citation.]' (*Ibid*.)

"Defendant's reliance on *Espinoza*, *supra*, 95 Cal.App.4th 1287, in which the defendant molested his 12-year-old daughter, is misplaced. In *Espinoza*, which was decided before *Cochran*, the court held there was insufficient evidence of duress, reasoning: 'The only way that we could say that defendant's lewd act on L. and attempt at intercourse with L. were accomplished by duress is if the mere fact that he was L.'s father and larger than her combined with her fear and limited intellectual level were sufficient to establish that the acts were accomplished by duress.... Duress cannot be established unless there is evidence that "the victim['s] participation was impelled, at least partly, by an implied threat...." [Citation.] No evidence was adduced that defendant's lewd act and attempt at intercourse were accompanied by any "direct or implied threat" of any kind. While it was clear that L. was afraid of defendant, no evidence was introduced to show that this fear was based on anything defendant had done other than to continue to molest her. It would be circular reasoning to find that her fear of molestation established that the molestation was accomplished by duress based on an implied threat of molestation.' (*Espinoza*, *supra*, at p. 1321.)

"*Espinoza* is distinguishable in that the victim in *Espinoza* was considerably older than Brianna. Because of Brianna's young age, Brianna was more susceptible to being coerced through fear and due to defendant's position of authority. Furthermore, in the instant case, Brianna stated she not only feared defendant but she also feared defendant would kill her or mother if she told anyone defendant was molesting her. While this case is in many significant ways[] similar to *Espinoza*, we conclude based on *Cochran* that there was sufficient evidence of an implied threat and thus duress." (*People v. Veale, supra,* 160 Cal.App.4th at pp. 47-50.)

Here, S.R. was the same age as the victim, Brianna, in *Veale*. Although defendant was not S.R.'s father, he was the father of S.R.'s sister and was a frequent visitor and baby-sitter in the home. He occupied a position of authority over S.R. Because of S.R.'s young age and defendant's position of authority, she was more susceptible to being coerced through fear. Defendant gave S.R. money and told her not to tell anyone about the acts. Defendant engaged in continuous exploitation of S.R. He locked the door to keep her sister out of the room. S.R. would tell defendant to leave her alone, but he would not. On at least one occasion when S.R. left the room, defendant yelled at her to return to the bedroom. Although defendant never expressly threatened S.R., she was scared and thought he might do bad things to her family. While S.R.'s testimony was not always consistent, it was sufficient to establish the required element of force.

II. Unanimity Instruction

The information charged each count as occurring within an eight-month time frame. As previously noted, the prosecution did not elect which act was the basis for each count. In his argument to the jury, the prosecutor discussed the elements of each of the crimes. In his discussion of count 1, lewd or lascivious act, the prosecutor discussed all of defendant's behavior--the touching, kissing, and licking of S.R.'s body and genitals and the penetration of her vagina with his penis.

The prosecutor then argued count 2, lewd or lascivious act with force, and stated it has the same elements as the first count he had just discussed, but with one additional element. The prosecutor lumped all of the acts together again in his discussion of the element of force in count 2 and argued force was present for all of the acts based on defendant's age, size, position of authority, and S.R.'s testimony that she tried to get away. The prosecutor argued count 3, aggravated sexual assault, was proven because S.R. testified that defendant put his nasty part into her private part.

At the end of his opening argument, the prosecutor summed up the choices to be made by the jury. He said: "Don't know how many times this defendant touched [S.R.],

okay. We'll never know how many times he touched her. He touched her a lot. We know that he touched her on December 18th because that was the night her mother went to the hospital. That's in evidence, okay? We know he touched her then. We know she was asleep, that he came in. She woke up with him licking her vagina.

"We know it happened one time in pick up [*sic*] truck in Madera, okay. And we know that one time he tried to put his penis inside of her. We know those three events happened. She identified them, okay? Other than that that [*sic*], it happened a lot of other times. There were other times when he kissed her on the mouth. There were other times this [*sic*] he licked her genitalia. There were other times whether [*sic*] he touched her. There were a lot [of] times. He's only charged with three counts in this case.

"We don't know how many times she was molested. He is only charged with three. The charges are alleged to [have] happened in that time period May 1st through December 31st. It may be all those offenses [actually] happened from December to -- I mean, from August to December. I don't know. It's possible. I don't know. It doesn't matter because we've just alleged a time period, okay?

"All you have to do is agree that all of you agree that at least three specific incidents happened, which incidences [*sic*] those were, and you have to be unanimous on that to find him guilty of those offenses, these charges, okay? Like I said, every single one of those really is by force, but we've alleged one non-force.

"Did he touch her non-forcibly? Well, he touched her [forcibly] every time, but certainly the elements have been established to prove non-force touching also. Absolutely. All right he touched her without question,

"How many times he touched her? A bunch of times. Did he touch her one time with force? Absolute[ly]. He probably touched her who knows how many times with force. He absolutely touched her at least one time with force.

"Did he engage in aggravated sexual assault with a child? Yes, because on one occasion, he put his penis inside of her. That's sexual intercourse. That's aggravated

sexual assault. Okay. Those are the charges. You need to agree unanimously on the charges, discuss which of those incidents satisfy those charges. Like I say, you can agree, but, yes, there was one unspecified time when he was licking her. She said it happened a bunch. There's un-unspecified time he was licking her. We don't know what the date was, or the circumstances were. That satisfies count one.

"If you want you can say there was unspecified event that satisfies count two, or you can say the thing in the truck satisfies count two, or you can say that the thing when she went to the hospital, the mother went to the hospital, satisfies count two. Doesn't matter. As long as you all agree."

Defense counsel argued the People had not produced proof beyond a reasonable doubt to prove the charges against defendant and that defendant never molested S.R. Defense counsel claimed the charges were brought as a means to solve the custody battle over G. Defense counsel went through each day mother, Ana, and defendant worked to demonstrate that defendant did not have the frequent sole access to S.R. as claimed by S.R. and her mother. In addition to disputing the charges in general, defense counsel attacked the charges specifically. As to the aggravated sexual assault, defense counsel asserted there was no evidence of penetration; thus that charge was not proved. For the lewd or lascivious act by force, defense counsel stated to the jury that there was no evidence of force. The truck incident was challenged because S.R. never said anything about the incident when interviewed by law enforcement or during the MDIC interview. Defense counsel conceded that the incident when others were away at the hospital was the one time defendant did not have an air-tight alibi of not being at home alone with S.R., yet he did not concede the incident occurred and attacked S.R.'s credibility and the credibility of others regarding this incident.

Because the prosecutor did not make an election as to the particular act that would support each count, the trial court instructed the jury pursuant to CALCRIM No. 3501, the unanimity instruction when generic testimony of the offense is presented.[3] The instruction was read to the jury as follows: "The defendant is charged with lewd and or lascivious act -- the defendant is charged with lewd or lascivious act with a child under 14 years. That's count one. Lewd or lascivious act with a child under 14 years by force, count two, and aggravated sexual assault of a child under 14 years, these are counts one, two and three, sometime during the period of May 1st 2006 to December 31st, 2006.

"The People have presented evidence of more than one act [t]o prove that the defendant committed these offenses. You must not find the defendant guilty unless:

"One. You all agree that the People have proved that the defendant committed at least one of those acts, and you all agree on which act he committed for each offense.

"Or.

"Two. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during that time period, and have proved that the defendant committed at least the number of offenses charged.

"Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one."

One of the purposes of the unanimity instruction is "'"to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." [Citation.] … "The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a

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[3] Defense counsel initially requested a modification to the unanimity instruction. He later withdrew this request. The requested modification has nothing to do with the issue before this court.

reasonable doubt that a defendant must have done something sufficient to convict on one count."' [Citation.]" (*People v. Baughman* (2008) 166 Cal.App.4th 1316, 1320, brackets in original.)

"'In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given.... But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, *the jury should be given a modified unanimity instruction* which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim. [¶] [B]ecause credibility is usually the "true issue" in these cases, "the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it. In either event, a defendant will have his unanimous jury verdict [citation] and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act [citations]."' [Citation.]" (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1448, fn. omitted.)

While credibility was certainly a main issue in this case, it was not the only defense offered to the charges. With the exception of one date, defendant claimed that the evidence proved he could not have been alone with S.R. while Ana and the mother were at work when the incidents allegedly happened. Defendant attacked the truck incident because S.R. did not report this incident until she testified at the preliminary hearing. Defendant attacked the aggravated sexual assault charge on the basis that there was no penetration. With these multiple viable defenses to the charges, it cannot be said that the jury, having found the victim to be credible, must have believed defendant committed all the acts and thus committed each specific act.

This brings us to defendant's claim that the instruction as given was incomplete and allowed the jury to find him guilty in counts 1 and 2 based on the same act of molestation. Defendant contends the jury should have been instructed that its verdicts on counts 1 and 2 must be predicated on separate acts. The instruction as given, argues defendant, allowed the jury to find him guilty of counts 1 and 2 based on the same act so long as the jury unanimously agreed that he committed the one act.

Respondent counters that the instructions clearly informed the jury it could not base its verdicts on counts 1 and 2 on the same act of molestation and presumably the jury followed these instructions. In addition, respondent contends defendant has failed to take into account that the Supreme Court in *People v. Jones* (1990) 51 Cal.3d 294 held that generic evidence of multiple allegations of child molestation will support one or more counts provided that the victim can "describe the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct." (*Id*. at p. 316.)

The *Jones* case simply has no application to the issue now raised here. Defendant's challenge is not to generic testimony, but to the instruction he claims allowed the jury to find him guilty in counts 1 and 2 based on only one act of child molestation. In particular the jury was told, "The People have presented evidence of more than one act [t]o prove that the defendant committed *these* offenses. You must not find the defendant guilty unless: [you] all agree that the People have proved that the defendant committed *at least one* of those acts, and you all agree on which act he committed for each offense." (Italics added.) In other words, to prove these offenses the jury needed to unanimously agree that defendant committed at least one act. The jury was not told that each conviction must rest upon a separate act or, in other words, that the same act cannot support more than one conviction. While the jury was instructed that it must unanimously agree on which act defendant committed for each offense, the

instruction did not preclude the jury from agreeing that the same act was sufficient to support each count.

We agree with defendant that error occurred. Defendant could not be convicted of a lewd or lascivious act and a lewd or lascivious act by force when those convictions are based on the same act. A lewd or lascivious act is a lesser included offense to a lewd or lascivious act by force. (*People v. Ward* (1986) 188 Cal.App.3d 459, 472.) A defendant may not be convicted of both a greater and lesser included offense arising from the same act. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) The trial court erred in not instructing the jury, on its own initiative, that the same act cannot provide the basis for more than one conviction.

We must now determine whether it is reasonably probable that a properly instructed jury would have reached a result more favorable to defendant if it had been properly instructed. (*People v. Garza* (2005) 35 Cal.4th 866, 882.) First, we find that option No. 2 in the unanimity instruction (that the People have proved that the defendant committed all the acts alleged to have occurred) does not alleviate the error. The jurors did not find all of the acts occurred because they were unable to reach a verdict on count 3, aggravated sexual assault. Although it could be argued that the jury found S.R. credible but did not find count 3 because they were in disagreement on whether or not S.R. was able to determine if she had been penetrated by defendant's penis or not, under the facts of this case we cannot say that the jury necessarily found S.R. credible regarding all counts. As previously set forth, defendant offered multiple defenses to the acts. He presented records and argument to show that he would not have had access to S.R. at the home on all but one occasion claimed by the prosecution. In addition, he attacked S.R.'s testimony regarding the truck incident because she did not reveal this incident until much later in the proceedings. Thus it is reasonably possible the jury found S.R. to not be

entirely credible and may have found the People proved only one act beyond a reasonable doubt. [4]

The only time the jury was told they must find at least three specific incidents was in the prosecutor's closing argument to the jury. The arguments of counsel are not a substitute for instructions from the court. (*People v. Harris* (2008) 43 Cal.4th 1269, 1320.) While the prosecutor made reference one time to finding specific incidents, the bulk of the prosecutor's argument lumped all of the acts together and said any of the acts were sufficient to prove the charges. The prosecutor's argument did not cure the instructional error.

Under the facts of this case, it is reasonably probable that a properly instructed jury would have convicted defendant of only one count; thus the error is not harmless.

III. Failure to Instruct on Lesser Included Offense

"The trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present and there is evidence that would justify a conviction of such a lesser offense." (*People v. Cooper* (1991) 53 Cal.3d 771, 827.)

Defendant was charged and convicted in count 2 of a lewd or lascivious act by force. A lewd or lascivious act is a lesser included offense to a lewd or lascivious act by force. (*People v. Ward*, *supra*, 188 Cal.App.3d at p. 472.) The jury was not instructed on the option of convicting defendant in count 2 of the lesser included offense of a lewd or lascivious act. Defendant contends this was error.

Although we previously found the evidence was sufficient to support a conviction for a lewd or lascivious act by force, the evidence of force was not particularly strong.

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[4] Respondent does not argue that the second choice (the jurors all agreed that the People proved that defendant committed all the acts alleged to have occurred) in the unanimity instruction applies.

We reject respondent's argument that the evidence did not require giving the lesser included offense instruction. While certain elements that would contribute to a finding of force were present for all offenses, S.R.'s testimony was inconsistent and vague as to when and if certain things occurred that would also contribute to a finding of force. The prosecutor did not elect which act was the basis of the lewd or lascivious act with force; thus we cannot analyze a particular act to determine if it was accomplished by force. There was evidence that would justify a conviction of the lesser included offense, and the trial court erred in failing to give an instruction on the lesser included offense.

Error in failing to instruct on a lesser included offense is judged under the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) standard of prejudice. "'A conviction of the charged offense may be reversed in consequence of this form of error only if, "after an examination of the entire cause, including the evidence" [citation], it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred.'" (*People v. Lasko* (2000) 23 Cal.4th 101, 111.) "Probability under *Watson* 'does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.'" (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.) "In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Moye* (2009) 47 Cal.4th 537, 556.)

Defendant claims that, given the dearth of evidence showing that he committed the lewd acts by force, it was reasonably probable that the jury would have found he was guilty of two counts of lewd acts without force instead of one count of lewd acts without force and one with force had it been given that option.

Respondent counters that ample evidence was presented that defendant committed at least one forcible lewd act. In addition, respondent argues that if the jury had believed

the People had not proved the lewd or lascivious act with force, it had the option of convicting him of only one count of committing a nonforcible lewd act and was not forced to an all-or-nothing choice. In addition, respondent claims the jury decided the factual question posed by the omitted instruction adversely to defendant under other properly given instructions. Respondent concludes that error, if any, was harmless.

The rule requiring the giving of lesser included offense instructions would be eviscerated if we were to adopt respondent's position that substantial evidence supported at least one count of a lewd or lascivious act by force. From the evidence presented at trial, the jury could have concluded defendant committed many lewd or lascivious acts against S.R. Because the evidence of force was relatively weak and amorphous, yet the evidence that defendant committed more than one lewd or lascivious act was strong, a decision to convict defendant of only one count of lewd or lascivious acts was not necessarily a palpable choice for the jury. There is nothing in the record to support respondent's position that the jury necessarily decided the factual question posed by the omitted instructions adversely to defendant under other properly given instructions. There is a reasonable probability that the claimed error affected the result. The error is not harmless.

IV. Instruction Regarding the Element of Fear

Defendant contends that CALCRIM No. 1111, defining the elements for a lewd or lascivious act by force, is ambiguous and does not properly convey the knowledge requirement regarding the victim's fear. Because we are reversing defendant's conviction for a lewd or lascivious act by force, this issue is moot. If the People choose to retry defendant for a lewd or lascivious act by force, defendant may bring any claimed instructional deficiencies to the attention of the trial court and seek modification of the instruction.

V. Circumstantial Evidence Instruction

"The role of CALCRIM No. 224 is to caution the jury before relying on circumstantial evidence to find the defendant guilty beyond a reasonable doubt." (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1187.) CALCRIM No. 224 was read to the jury as follows: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proven, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusion[s] points to a finding of not guilty, and another to a finding of guilty, you must accept the one that points to the finding of not guilty. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

Defendant requested that one of two alternatives be added to CALCRIM No. 224. His proposed modifications were: "Alternative a: [¶] You may not infer a fact based on a mere possibility that the prosecution has proven it. A mere possibility is nothing more than a suspicion, which is not a sufficient basis for an inference that a fact has been proven. [¶] Please remember, the defendant is not required to prove any fact. [¶] Alternative b: [¶] You may not infer a fact based on a mere possibility that the fact is true. A mere possibility is nothing more than a suspicion, which is not a sufficient basis for an inference of fact. [¶] Please remember, the defendant is not required to prove any fact."

The trial court refused the proposed modifications. It stated: "[T]he idea of [mere] possibility is something that I'm unwilling to go as to go far -- it's not necessarily a misstatement of law, not at all. On the other hand, I think that in this particular case,

the [notion] of [mere] possibility as to circumstantial evidence would, maybe, apply to a different case than this, but not this case. And the reason for that is that the evidence in this case -- the circumstantial evidence in this case which is offered by the prosecution and there is -- is not the primary focus of the evidence, whereas in another case in which virtually everything is in the prosecution's case, virtually every element is sought to be proven by [circumstantial] evidence. That might actually be something that you'd want to put in the instructions.

"In this case, the primary focus of the evidence is direct evidence. It's not circumstantial. So this is -- don't think [it's] applicable to this case. It may be to another case. I don't find anything particularly wrong with that instruction[], but I don't think it's applicable in this case."

Defendant claims the trial court erred in failing to add his proposed modifications to CALCRIM No. 224. He argues the proposed instruction was a correct one and was directly related to the conclusions by the medical experts that one would not necessarily expect to see any physical signs of molestation under the facts of this case. Thus defendant contends the modification related to a key aspect of his case--the absence of physical evidence and the prosecution's attempts to explain why there was a lack of physical evidence. In addition, defendant asserts the proposed modification was necessary because the concept of mere possibility was not covered in any of the other instructions.

Assuming for the sake of argument the requested modification is a correct statement of the law and the trial court erred in failing to modify CALCRIM No. 224, we find that it is not reasonably probable the trial court's failure to so instruct affected the verdicts. (*People v. Hughes* (2002) 27 Cal.4th 287, 363.)

The jurors were instructed that whenever the court tells them the People must prove something it means they must prove it beyond a reasonable doubt. Reasonable doubt was defined as "proof that leaves you with an abiding conviction that the charge is

true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." (CALCRIM No. 220.)

The jury was instructed on more than one occasion that the People must prove beyond a reasonable doubt each fact necessary to find the defendant guilty. Proof beyond a reasonable doubt is clearly proof that far exceeds a mere possibility. The instructions as given made it known to the jurors that their decisions of fact could not be based on a mere possibility. Defendant was thus not prejudiced by the failure to give his proposed modification to CALCRIM No. 224.

VI. Admission of MDIC Interview

In his first trial, defendant made a general motion to exclude S.R.'s prior out-of-court statements. It was argued that these statements were hearsay and were not admissible as prior consistent statements. In his second trial, defendant filed a motion for the court to take up all of his previously filed motions without having to refile the same documents; included in this motion was the motion to exclude S.R.'s prior out-of-court statements.

Prior to defendant's retrial, the court heard the motions in limine. The parties discussed the motion to exclude all prior out-of-court statements of S.R. The court noted the prior hearing on this issue was very contentious as to the statement by S.R. to the nurse during the sexual assault examination. The key question in the prior motion, as recollected by the prosecutor and the court, was that defendant had not received notice of the statement to the nurse. Defense counsel stated that he would like to know if anything else was going to be introduced. The prosecutor responded that he might play the MDIC interview. Defense counsel responded that he had the tape of the interview. The prosecutor noted defense counsel objected to that originally. The court took the motion under submission, wanting to look back at its previous rulings.

The court returned to the issue of the motion to exclude S.R.'s hearsay statements. The court stated this had to do with the "single statement" (referring to the statement to

the nurse) and whether notice had been given to the defense. It was agreed that notice had now been provided and the statement was admissible.

Defense counsel questioned if there were other things the prosecutor was going to use. The prosecutor said the only other out-of-court statement he might present would be by playing the MDIC interview, which was not played at the first trial. The court questioned if there was anything else remaining of the motion. Defense counsel responded no, as long as he knew what the prosecutor was talking about. Defense counsel stated that if something else comes up he would renew the motion.

The court asked defense counsel if he was clear that the prosecutor was trying to admit the single sentence omitted from the nurse's report. The court pointed out that the prosecutor also wished to introduce the tape of the MDIC interview, and noted this was not played at the first trial. Defense counsel responded that he had that tape and could go through it. Again defense counsel stated that if something else came up he would renew his motion.

During the trial the court announced that the prosecutor was now going to play the tape of the MDIC interview. The tape was played and the prosecutor sought to move the original disc (People's exhibit No. 110) into evidence. At that time the court asked if there was any objection and defense counsel responded, "None."

The defense expert, Bruce Terrell, stated he reviewed the transcript of the MDIC interview as well as the videotape of the interview. He stated that most children who have been abused look scared and upset and often break into tears, yet during the interview of S.R. he saw none of that and it appeared more like she was telling a story in class. In addition, he said that smiling and giggling during the interview would be very unusual in a child who has been sexually assaulted. In addition, Terrell did not agree with some of the interviewer's questions, finding them to be leading and thus eliciting a less reliable answer.

During his closing argument to the jury, defendant repeatedly referred to the MDIC interview and told the jury to review the tape of the MDIC interview when it was deliberating. In his final reference to the MDIC tape, defense counsel states, "The MDIC tape shows this case for what it is."

Defendant now claims the court erred in allowing the recording of S.R.'s MDIC interview into evidence because it contained hearsay statements without an exception. The People respond that defendant forfeited this issue by not raising it below. Defendant replies the issue was not forfeited because his renewed motion from the first trial included a motion to exclude S.R.'s out-of-court statement and this was sufficient notice that he was again raising this issue.

Pursuant to Evidence Code section 353, a claim of the erroneous admission of evidence is forfeited on appeal unless timely and specific objection was made to the trial court. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) "In requiring an objection at trial, the forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error." (*People v. Kennedy* (2005) 36 Cal.4th 595, 612.)

Defendant has forfeited his claim. While the written motions presented for the first trial included a generic motion challenging all of S.R.'s out-of-court pretrial statements as hearsay, it is clear that the actual motion at the first trial was narrowed to a dispute over the information from the nurse who performed the sexual assault examination.[5] The MDIC interview was not introduced into evidence at the first trial. Defense counsel did not dispute this during the in limine motions before the current trial. In addition, at no time when the court or counsel mentioned the MDIC interview did defense counsel object to the admission of the interview. Defense counsel acknowledged

[5] The record on appeal does not contain the reporter's transcript from the first trial.

he had the tape of the interview and said he would renew any objections as the issues arose. When the People sought to play the tape of the MDIC interview, defendant did not object. When the People sought to move the tape of the interview into evidence, defendant did not object. Defendant utilized the interview during his examination of his expert. In addition, defendant heavily relied on the interview as part of his defense and during closing arguments asked the jury to review the MDIC interview tape during their deliberations and said the MDIC interview "shows this case for what it is." From all of the above, it is clear defendant did not object to the admission of the tape of the MDIC interview. He has thus forfeited his claim challenging the admission of this evidence on appeal.

VII. Sentencing Issues

The trial court ordered defendant to pay $630 to the "Victim Compensation Board." Defendant claims the order was not supported by substantial evidence and requires reversal. Because this matter must be remanded for resentencing, this issue is moot. If restitution is once again ordered by the trial court, defendant may challenge the imposition of the restitution order in the trial court.

In a supplemental brief defendant relies on *People v. Goodliffe* (2009) 177 Cal.App.4th 723 to argue the trial court erred in imposing full consecutive sentences under Penal Code section 667.6. Because one count is being reversed and this matter is being remanded for further proceedings, the issue of consecutive sentences is moot at this time.

DISPOSITION

The conviction for lewd or lascivious acts by force is reversed. If the prosecution seeks to retry defendant for the lewd or lascivious act by force in count 2, it must also retry defendant for the lewd or lascivious act in count 1 because the unanimity instructional error makes it impossible to determine if defendant's convictions were based on one act or two different acts. If, after the filing of the remittitur in the trial

court, the People do not bring defendant to retrial on both of the charged offenses within the time limit of Penal Code section 1382, subdivision (a)(2), the trial court shall proceed as if the remittitur constituted an affirmance of the conviction of one count of a lewd or lascivious act and shall resentence defendant accordingly.

_____
VARTABEDIAN, Acting P.J.

WE CONCUR:

_____
GOMES, J.

_____
POOCHIGIAN, J.